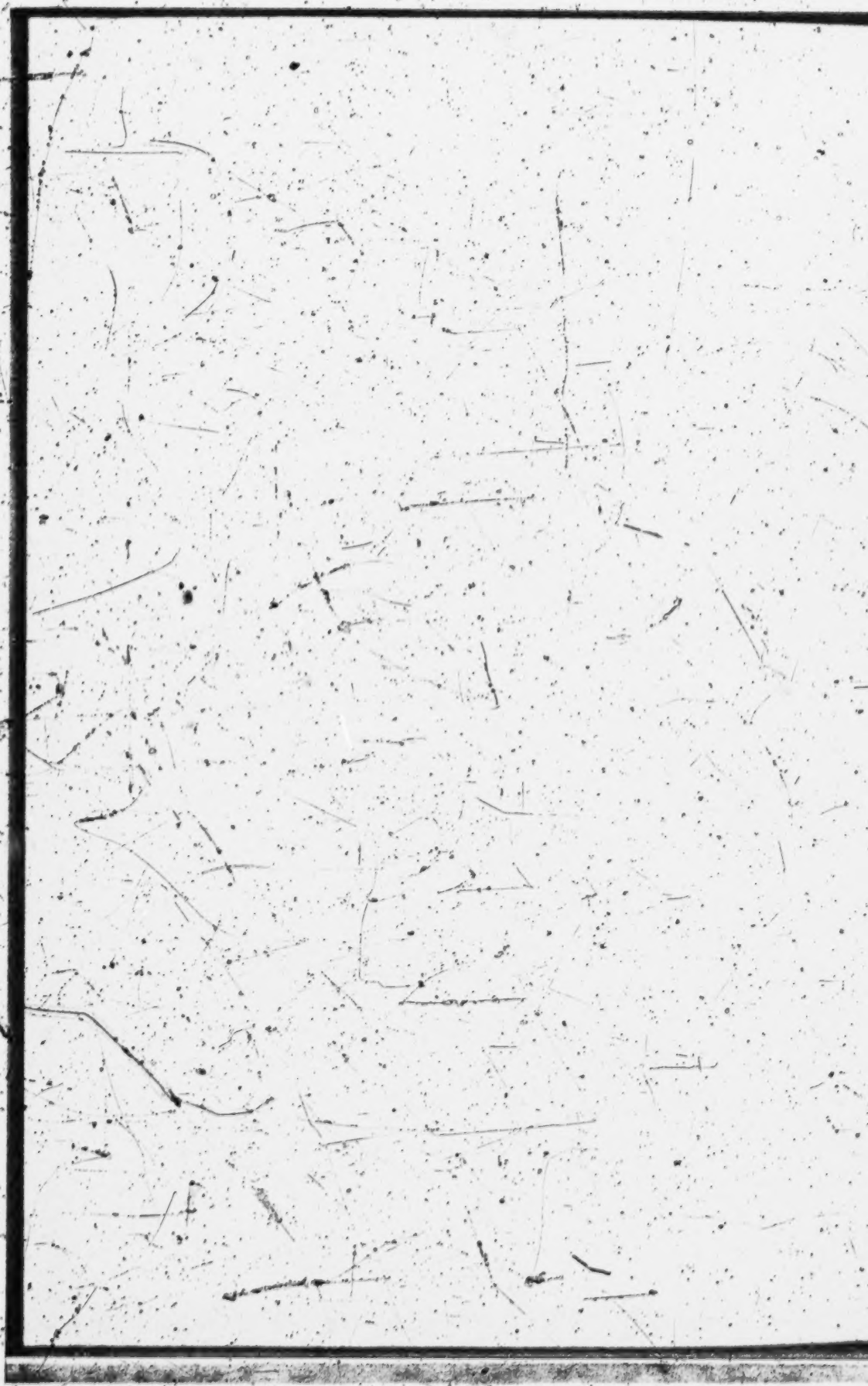

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA,
Appellant,

v.

PENN-OLIN CHEMICAL COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF FOR APPELLEES

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November 17, 1967

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QUESTION PRESENTED

The only question presented on this appeal is whether the district court's decision was clearly erroneous in finding that appellant had failed to establish the probability that but for the joint venture either Pennsalt or Olin would have entered the relevant market independently.

Appellant seeks to present the further question whether, assuming the probability of independent entry by one, the elimination of the potential competition of the other by the joint venture would have had the probable effect of lessening competition substantially. That question was not reached by the district court because its finding on probability of entry necessitated dismissal of the complaint (R. 808; FFR. 835).*

STATEMENT

Appellant's statement of facts is incomplete, inaccurate and misleading.

Nowhere does it refer to the fact that, by the time of the entry of Penn-Olin, the growth in the demand for sodium chlorate in the Southeast had leveled off (R. 189, 258-59, 388; FFR. 824). Nowhere does it refer to the fact that, as early as 1959, pulp and paper companies, the major consumers of sodium chlorate, were considering producing their own sodium chlorate, having it produced for them at an over-the-fence location or adopting bleaching methods which did not

*"R." refers to the printed record in this Court, "FFR." to findings of fact by the district court in the printed record, "Tr." to portions of the transcript of the trial on remand which are not in the printed record, "Br." to appellant's brief in this Court, "PX" to plaintiff's exhibits, "DX" to defendants' exhibits, "PFR" to plaintiff's proposed findings of fact on remand, "DFR" to defendants' proposed findings of fact on remand and "CDFR" to plaintiff's comments on defendants' proposed findings of fact on remand.

use sodium chlorate (R. 213, 252, 219-33, 287, 303-06, 315, 324-28, 329-37, 391, 394-97; FFR. 824). Nowhere does it mention that, as appellant admitted below, the price of sodium chlorate was reduced about 9% in 1964 as a result of those factors (DX 52; R. 149, 179-81, 257; DFR 7.4; CDFR 7.4). And nowhere does it reveal the fact that, by the time the Penn-Olin project was finally approved late in August 1960 (FFR. 820), the outlook for ammonium perchlorate—for Pennsalt the *sine qua non* for any independent eastern chlorate venture—was bleak. By then, the Assistant Secretary of Defense had advised Pennsalt that there would be a "substantial excess of capacity over requirements, for the next two or three years" (DX 2, R. 663; FFR. 835). Indeed, by the time of the remand trial the demand for ammonium perchlorate, used almost exclusively as a fuel for missiles, had declined radically and was less than half of capacity (Tr. 702-03; FFR. 829). By then the ammonium perchlorate plant of Pennsalt in Oregon and of Hooker in the Southeast had been shut down (Tr. 702; R. 186), and further declines in demand were expected (Tr. 431-32). Thus the most important facts in the sodium chlorate picture since 1959 have been ignored by appellant.

The facts have been carefully reviewed and set forth in painstaking detail in the two opinions of the district court and need not be repeated here in full. We shall, however, comment briefly on the most significant omissions and distortions in appellant's treatment of the facts.

Supply and Demand

Appellant describes the growth of sodium chlorate demand in the Southeast up to 1960, but omits any reference to the marked changes in supply-demand relationships since then (Br. at 8-10).

Total shipments of sodium chlorate to the Southeast market in 1960 amounted to approximately 47,000 tons with an aggregate market value, at $163 per ton, of under $8,000,000 (FFR. 772-74). That market was supplied almost entirely by Hooker and American Potash, the latter using Allied Chemical as it sales agent to the pulp and paper industry (FFR. 767, 784-85, 794-99).* The aggregate capacity of the Southeast plants of Hooker and American Potash was 47,000 tons in 1960 and the 1961 enlargement of the American Potash plant increased that capacity to 54,500 tons (FFR. 775-76). Penn-Olin was formed "to break into a market to challenge the supremacy of two companies which were dominating it" (FFR. 782).

Following the entry of Penn-Olin and PPG, capacity in the Southeast increased to 83,000 tons in 1962, 95,000 tons in 1963 and 103,200 tons in 1964 (DX 111 at 2; R. 794).

Although during the 1950's the demand for sodium chlorate in the Southeast market had been rapidly growing, by the early 1960's many of the pulp and paper companies had completed their conversion to the use of sodium chlorate for bleaching and the rate of growth in consumption had slowed down substantially (FFR. 824). By that time, it had been recognized that those companies might produce their own sodium chlorate and thus reduce the market for merchant sodium chlorate by as much as 55% (R. 194, 314).

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*Appellant's assertion that before Penn-Olin Pennsalt was an actual competitor accounting for 8.9% of the market (Br. at 10) is wholly misleading. Pennsalt's shipments from its Oregon plant to the Southeast in 1960 amounted to 4,186 tons; but of that quantity, 3,203 tons were sold by Olin under a temporary test marketing project on which Pennsalt sustained losses at the rate of $80,000 per year (FFR. 776). It is conceded that the relevant market is the Southeast and the district court found that Pennsalt was not an effective competitor in that market (FFR. 777).

Potential Captive Production

The failure even to mention the threat of captive production by the pulp and paper companies is, perhaps, the most startling omission from appellant's brief. Production and use technology have long been available to any potential merchant or captive producer (R. 154-56, 158, 206, 208, 239, 266, 270-71, 286-87, 293-95, 299, 305-06, 328-37, 395-98, 404; FFR. 769), and technological changes between 1959 and the remand trial in 1965 greatly facilitated the possibility of entry by pulp and paper companies (Tr. 135; R. 181-84, 280-85, 317, 385). During that period at least ten major pulp and paper companies in the Southeast which were large purchasers of sodium chlorate—Brunswick, Buckeye, Champion, Crown Zellerbach, Georgia-Pacific, International Paper, Marathon, Rayonier, Riegel and Union Bag—had actively considered becoming producers (DX 81, 82, R. 730; DX 98-104; R. 332-37, 386-87, 391-93, 395-98, 315, 250-54, 148, 181, 194, 255-57, 261-62, 314, 287-90, 297-298, 219-27, 382-83, 303-07). Outside the Southeast four such companies—Dryden, Georgia-Pacific, Marathon and Weyerhaeuser—had already become producers, and in 1965 Dominion Tar was planning its own production (DX 79; R. 227-28, 233, 251-52, 291, 326-28, 348, 148-49, 315, 287-88, 304-05, 166, 294, 330-32) while in the Southeast Brunswick, Riegel and Union Bag were on the verge of doing so and Buckeye was a mere step away (R. 219-27, 289-90, 382-83, 303-07, 334-36, 386-87, 391-93, 395-97).

The actual merchant producers of sodium chlorate considered the threat of production by the pulp and paper mills as being a more serious form of potential competition than that of potential merchant producers, because business lost to a captive mill cannot be recaptured. To the extent that sodium chlorate pricing has been influenced at all by potential competition, it has been influenced primarily by pulp and

paper mills rather than by potential merchant producers. (R. 151, 257-58; DFR 7.4; CDFR 7.4).

Potential Merchant Producers

Both before and after Penn-Olin's entry into the relevant market, that market was surrounded by substantial potential competitors. Allied Chemical, PPG, American Cyanamid, Chipman, Diamond Alkali, Dow, FMC, Kaiser, Stauffer, Virginia Chemicals and Wyandotte, most of which, like Pennsalt and Olin, were members of the chlor-alkali industry, had the financial resources, electrolytic technology and special relationship to the Southeast sodium chlorate market which would have enabled them to enter that market at will.* Each had also conducted periodic, continuing investigations of the market in order to determine whether entry should be undertaken. The evidence concerning their capability and interest in sodium chlorate is summarized below.

Although appellant concedes that two members of that group, PPG and Allied Chemical, were "serious potential entrants" (Br. at 56), its statement of facts is devoted to minimizing the status of other members of the group as potential competitors (Br. at 18-24). Appellant does not explain how each of these well-financed companies was able to resist the lure of the market which, by appellant's hypothesis, would necessarily have attracted Penn-Olin's parents. The evidence it cites to negate their status as potential com-

*Although the government interviewed representatives of some of these companies, it called no witness from any of them at either trial.

DX 111, which contains stipulated financial data as to specified chemical companies and pulp and paper companies, was designated by appellees for printing but was not included in the printed transcript of record. A copy of it is attached as an appendix to this brief.

petitors is garnered largely from sources which, by app
lant's standards, are untrustworthy because "subjective

The significance which appellant acords to the owne
ship of a chlorine dioxide generating process as a fact
bearing upon the likelihood of entry by a chemical compa
is totally unwarranted. The evidence established, and t
district court found, that such technology had been ava
able free to the pulp and paper companies since the ear
1950's (FFR. 769).

The chlor-alkali companies, as a group, were not on
potential competitors, but were recognized as such by t
market occupants (R. 143-44, 175-77, 245-47).

Consideration of Independent Entry by Pennsalt and Olin

In its review of the history of Pennsalt's considerati
of independent entry in the Southeast (Br. at 10-15), ap
pellant omits any reference to Pennsalt's established in
vestment policy, which effectively foreclosed the possibilit
of such entry.

In 1955 Pennsalt's return on shareholders' investmen
in comparison with that of other chemical companies wa
very poor—6.8% against an average of 13.5% (DX-50
R. 692; R. 94-95; FFR. 829). Because of the importance o
this factor in attracting the investor's dollar, a policy wa
instituted in early 1955 under which investment in new
projects had to show a 30% return before taxes. This policy
was later refined and since at least 1957 it has required a
minimum projected rate of return of 25% for basic or
staple products. More than 25% has been required on proj
ects involving a product which is subject to seasonal or
cyclical variations, used by only one consuming group, or
subject to rapid technical obsolescence. Pennsalt has ad-
hered to that policy and its return on shareholders' invest-

ment has increased from 6.8% in 1955 to 10.6% in 1964. (DX-50, R. 692; PX 339, R. 560; R. 94-95; FFR. 825, 829.) An important aspect of the policy has been emphasis on specialties and chemical intermediates (which do not include sodium chlorate) because they have consistently provided a higher rate of return than industrial or commodity chemicals (DX 53, R. 694-95; DX 54, R. 696-97; DX 55, R. 698-703; R. 353-55).

In its consideration of the possibility of independent entry in sodium chlorate alone, Pennsalt was unable to project a before-tax return greater than 15.9% (FFR. 829). The capital requirements of an independently-owned plant and the low rate of return led it to decide against independent entry in December 1957 and it never thereafter altered that decision (FFR. 826).*

Pennsalt did for a short time thereafter seriously consider entering the Southeast sodium chlorate market by means of a combination sodium chlorate-ammonium perchlorate plant. Such a combination plant looked attractive because hoped-for high profits in perchlorate compensated for the ever unattractive return on sodium chlorate. But the high hopes for perchlorate quickly disappeared. Specifically, the only such project which ever looked attractive, although at the same time seen as a gamble from a market

*The quality of the evidence on which appellant relies to support its argument that the "record overwhelmingly demonstrates the capability and special incentive of both firms to enter independently" (Br. at 40) is exemplified by PX 63 (Br. at 50). PX 63 is a letter dated February 2, 1955, from the one salesman Pennsalt had in the Southeast to handle all industrial chemicals (R. 72-73, 93), and it was the basis for the February 18, 1955, estimate (PX 64) that Pennsalt could sell about 5,000-8,000 tons of sodium chlorate in the Southeast if it constructed a plant at Calvert City. Pennsalt concluded on the basis of that estimate that the return was so unattractive that the expense of refining the figures further was unwarranted; appellant admitted this fact below (DFR 1.1; CDFR 1.1).

and profitability viewpoint, was the one discussed at the November 3, 1958, meeting which contemplated a 30,000 ton sodium chlorate plant in combination with a 10,000 ton ammonium perchlorate plant (PX 146, R. 506-10). The projected return of 31% was based on an estimate of 13.3% for sodium chlorate and 70.2% for perchlorate (FFR. 827, 832). Yet just a week later Pennsalt found out about miscalculations which had overestimated perchlorate demand by 100% (DX 1, R. 661). An estimate prepared April 10, 1959, on a 25,000 ton chlorate-5,000 ton perchlorate plant showed a projected return of 24.1% (PX 165, R. 526). The district court found that this return was below Pennsalt's investment standard (FFR. 829).

Appellant's statement (Br. at 15) that Pennsalt projected a yield of 42.7% on an independently-owned combined plant is simply not true. The projected return on that project was 24.1% on an investment of over $9,000,000. The projection of 42.7% did not assume independent entry but was based on Pennsalt's equity investment in a joint venture with part of the required capital borrowed by a jointly-owned subsidiary (FFR. 829).

Pennsalt ultimately rejected a combined chlorate-perchlorate plant. That its decision was an objective assessment of the situation was confirmed by Defense Department advice in August 1960 that the existing substantial excess of capacity for perchlorate production would continue for the next two or three years (FFR. 835). With respect to the possibility that absent a joint venture Pennsalt alone would have constructed a facility in the Southeast for the manufacture of chlorate alone or in combination with perchlorate, the district court noted that "anything is possible" but found that "if the record is to be the criterion, it is unlikely that this would have occurred" (FFR. 835).

Olin's consideration of independent entry also involved inadequate projected rates of return. A proposal by its Chemicals Division in April 1959 for a 15,000 ton plant at a cost of $4,000,000 was rejected because its estimated after-tax return of 11% was not sufficiently attractive. A study within that division of the possibility of a combination sodium chlorate—chlor-alkali plant estimated a return of 13.1%, but that study never resulted in a recommendation and, consequently, the estimate was never reviewed (FFR. 814-15, 821-23; PX 428, R. 568-76).*

Even the more attractive return initially projected for an equity investment in Penn-Olin was inadequate for Olin. After signing the February 11, 1960, letter of intent, Olin seriously considered rejecting the project (FFR. 818). The project was not finally approved by Olin until late in August 1960, after revisions which increased the rated capacity of the plant from 25,000 to 26,500 tons, reduced its estimated cost by $300,000 and indicated operating economies which increased the projected rate of return (FFR. 819-20).

In an attempt to bolster its contention that Olin was a likely candidate for independent entry, appellant states that Olin purchased "substantial" amounts of sodium chlorate for its internal requirements (Br. at 5, 18, 50). The fact is that Olin's entire purchases for its own use in 1960 amounted to only 1,350 tons (FFR. 783).** The statement that this gave Olin "a guaranteed market for the product" (Br. at 50) is patently absurd.

Appellant also asserts that Olin had spent "millions of dollars" promoting the Mathieson process and that it "could

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*Another study of the possibility of a 14,000 ton plant estimated a higher return based upon the use of a new cell using platinized titanium anodes (Br. at 16). As the court below noted, that was based entirely on a laboratory test; the feasibility of using the cell commercially had not been demonstrated; and any forecast of profitability based on its use was of doubtful validity (FFR. 814). PPG thoroughly investigated such a cell and decided not to use it in its Southeast plant (R. 151).

**The parties stipulated that 1960 imports of 4,152 tons were "not substantial" in amount (FFR. 766).

not exploit that process fully unless it manufactured sodium chlorate itself" (Br. at 50). Those statements are not only unsupported in the record but are in obvious conflict with the undisputed facts. The Mathieson process had nothing to do with the production of sodium chlorate but related solely to its use in the generation of chlorine dioxide. The suggestion that Olin needed to manufacture sodium chlorate to exploit the Mathieson process is incomprehensible. The Mathieson process (as well as the Solvay process of Allied Chemical) had been licensed royalty free to pulp and paper companies since the early 1950's (FFR. 769) and, accordingly, whatever possibility of "exploitation" may have originally existed had been abandoned long before the creation of Penn-Olin.

Appellant argues (Br. at 51) that the fact that Pennsalt and Olin "ultimately did enter (albeit jointly), expending some $7.5 million to construct a 26,500 ton plant expected to return only 10.1 percent on investment after taxes, is a persuasive indication" of the probability of independent entry. That argument ignores the significant differences between independent entry and entry by joint venture which made the latter, but not the former, acceptable to Pennsalt and Olin. The Penn-Olin project contemplated a plant with a capacity substantially larger than that which either parent alone ever seriously considered as a possibility in terms of independent ability to market. Furthermore, of the contemplated capital requirement of $7.5 million, $4.5 million was to be borrowed by Penn-Olin and the balance provided one-half by each of the parents (FFR. 820).* Thus, on a Penn-

*The borrowing feature of the Penn-Olin project was based upon the fact that Penn-Olin borrowings would not be consolidated in the balance sheet of either Pennsalt or of Olin and therefore would not affect the debt ratio of either (FFR. 821). Appellant's statement that Penn-Olin made no effort to secure a loan (Br. at 8) is based upon testimony that Pennsalt made no effort to borrow for an independent venture (PX 398, R. 97-98) and ignores the testimony that Penn-Olin was unable to borrow because of the pendency of this action (Transcript of first trial 325; R. 583).

Olin return estimated by Pennsalt on a before-tax basis at 19%, the estimated return on its equity investment was 31% (PX 257, R. 556). Olin's projection of a 10.1% Penn-Olin return after taxes (FFR. 819) was in line with Pennsalt's before-tax estimate of 19%. Based on the same assumption as to borrowed capital, the after-tax return on Olin's equity investment would have approximated 17%.

The leveling off of demand for chlorate, the collapse in demand for ammonium perchlorate, the likelihood of a reduction in price levels, the technological changes which enabled production by pulp and paper companies, and the potential competition of the chlor-alkali industry were significant developments apparent before final decision in August 1960 to proceed with Penn-Olin. PPG announced its entry in July 1961 and the reduction in market prices took place in 1964. The district court noted that these factors would have made continued interest in sodium chlorate on the part of Pennsalt or Olin unlikely (FFR. 824). Yet appellant ignores them completely.*

SUMMARY OF ARGUMENT

I

The district court's finding as to the probability of independent entry by either Pennsalt or Olin was a finding of fact which may not be set aside unless clearly erroneous.

The evidence before this Court on the first appeal bearing on that issue was substantially augmented on remand

*In the court below appellant first attacked all this evidence as "post-acquisition" evidence but ultimately conceded in its post-trial brief on remand that it had been "correctly admitted". This Court's decision in *FTC* v. *Consolidated Foods Corp.*, 380 U. S. 592 (1965), settled that "post-acquisition" evidence is properly considered in resolving these issues. Indeed, this Court had already said in the instant case that the "economic effects" of the formation of Penn-Olin are to be measured "at the time of suit" rather than at the time of the transaction. 378 U. S. at 168. *See also, United States* v. *du Pont & Co.*, 353 U. S. 586 (1957); *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962).

by evidence of the leveling off of the demand for sodium chlorate in the relevant market, by evidence as to the number of other potential merchant producers and, most significantly, by evidence of the effect upon the market of the prospect of captive production by the pulp and paper companies, who were the major consumers of sodium chlorate.

Against that market background, the trial judge carefully reviewed the evidence relied on by appellant to show the likelihood of independent entry by Pennsalt or Olin and correctly concluded that such evidence was insufficient to establish probability. Although each had considered the possibility of independent entry, the projected rates of return were insufficient and it was only the significantly higher return projected for an equity investment in the joint venture, predicated upon the economics of a larger plant and the opportunity to utilize borrowed capital without affecting the balance sheet of either parent that made the joint venture feasible.

The appeal is based entirely on appellant's views as to the weight of the evidence. On the first appeal this Court rejected the contention made again on this appeal that, to establish probability of entry, it was sufficient to show that each company had the capacity and incentive to enter. Contrary to appellant's claim, the district court did not impose upon appellant the burden of proving by direct evidence an affirmative intention or decision to enter. And appellant's suggestion that evidence of intent should be considered when it points in the direction of entry and excluded when it points in the opposite direction is wholly without merit.

II

The question whether, assuming probability of independent entry either by Olin or by Pennsalt, the elimination by Penn-Olin of the potential competition of the other

would have been likely to lessen competition substantially was not reached by the district court and is not properly before this Court. Even if it were, however, the question would have to be answered in the negative.

Entry of Penn-Olin established a new competitive force in the market. Appellant's argument as to the "lessening" of competition is based upon the claim that the increased competition produced by Penn-Olin was less than would have existed following independent entry by one of the parents.

The evidence on remand established not only that there was a large number of other chemical companies who were and still are potential merchant producers of sodium chlorate but that the larger pulp and paper mills were and still are potential producers of chlorate for captive use. From the standpoint of the producers in the market, the most significant potential competition was that of the pulp and paper companies and no single potential merchant competitor had any special significance.

Although prior to Penn-Olin, Pennsalt and Olin were part of a large group of potential competitors, neither was significant in the sense of having any individual influence on the market. If either had entered alone instead of Penn-Olin, it would not have provided any greater actual competition than was provided by Penn-Olin and the elimination of the other as a potential competitor could not have resulted in any appreciable lessening of the potential competition which surrounded the market.

ARGUMENT

I.

THE DISTRICT COURT'S FINDING ON THE PROBABILITY OF INDEPENDENT ENTRY WAS NOT ERRONEOUS.

This appeal is based on appellant's quarrel with the trial court's findings of fact. It does not present any question of

substantive antitrust law; it presents only the question whether the district court's findings are "clearly erroneous" within the meaning of Rule 52(a) (Br. at 29).

The determination that appellant had failed to prove that, absent the joint venture, either Pennsalt or Olin probably would have entered the relevant market independently was a finding of fact: *United States* v. *du Pont & Co.*, 351 U. S. 377 (1956); *United States* v. *Oregon State Medical Soc'y*, 343 U. S. 326 (1952). Appellant concedes in its argument that it is seeking review of a "district court fact-finding" (Br. at 42). And in *United States* v. *Crocker-Anglo Nat'l Bank*, 263 F. Supp. 125 (N. D. Cal. 1966), appellant described the Penn-Olin district court opinion on remand as follows:

> ". . . That opinion, however, turned entirely on its own particular factual situation and in no way presumed to alter the basic legal principles on potential competition enunciated by the Supreme Court in its opinion in the case 378 U. S. 158 (1964). . . ." Plaintiff's Post-Trial Reply Brief, Dec. 23, 1965, p. 18.

The factual issue as to the probability of independent entry was explicitly referred by this Court to the district court in remanding the case for findings notwithstanding the view of the majority that the evidence then before it on that issue "reaches the prima facie stage" 378 U. S. at 175.

A *prima facie* case means no more than evidence sufficient to justify, but not to compel, an inference. *See* 9 WIGMORE, EVIDENCE § 2494 (3d ed. 1940). The inadequacy of the first record on subjects this Court deemed important is evidenced by the fact that several elements of the Government's *prima facie* case, suggested in the record com-

piled at the first trial, were belied by the facts developed at the second trial.

Although this Court stated that "the evidence shows beyond question that the industry was rapidly expanding", the evidence at the second trial showed that demand for chlorate had leveled off. The evidence at the first trial indicated to this Court that "few corporations had the inclination, resources and know-how to enter this market" 378 U. S. at 175. The evidence at the second trial showed not only the inclination, resources and know-how of the major pulp and paper manufacturers, but also the inclination, resources and know-how of substantially all the chlor-alkali group which, like the Penn-Olin parents, "had long been identified with the industry", had "evidenced a long sustained and strong interest in entering the relevant market" and "enjoyed good reputation and business connections with . . . the pulp and paper mills".

After two trials and in the light of this Court's opinion on the prior appeal, the trial judge gave careful and thorough consideration to all relevant evidence, both documentary and testimonial, judged the credibility of the witnesses, weighed the evidence and discharged his fact-finding function.

Appellant does not assign as error any ruling of the court on the admission or rejection of evidence but, because its views as to the weight of the evidence differ from those of the district court, urges that the district court must have applied an erroneous evidentiary standard.* *Cf. United States* v. *Yellow Cab Co.*, 338 U. S. 338, 339-40 (1949).

Although not clearly or precisely articulated in appellant's brief, its argument that the district court applied an

*In advancing that position, appellant fails to meet the ultimate necessity of showing not merely that the court reasoned incorrectly but that the result cannot be supported by the record. *Jaffke* v. *Dunham*, 352 U. S. 280 (1957).

erroneous evidentiary standard appears to involve three separate suggestions:

1. the suggestion—already rejected by this Court—that probability of independent entry should be presumed from a showing of capability and incentive to enter (Br. at 30, 31, 35, 38, 39);

2. the suggestion—without foundation in fact—that the district court imposed a burden on appellant to adduce direct evidence of corporate intent to enter the market independently (Br. at 29, 30, 43-45); and

3. the suggestion—novel, but wholly without merit—that this Court should now adopt a rule of evidence which would accord decisive weight to inferences from external evidence—which appellant terms "objective"—and exclude consideration of internal evidence of actual corporate decisions, policies and planning—which, if and only if they are adverse to appellant's position, appellant terms "subjective" (Br. at 30, 34-35, 37, 41-45).

Appellant's first suggestion is not based on any existing rule of law but is advanced as a rule that appellant would like to have adopted (Br. at 38-40) notwithstanding its concession that proof of probability of entry is required (Br. at 33, 34; Tr. 14). But that suggestion was rejected by this Court on the first appeal. Both Pennsalt and Olin were concededly potential competitors, each with capability and interest, and appellant then argued that it was sufficient to show that either "could" have entered. 378 U. S. at 172-73. In remanding the case for findings on the issue of probability, this Court necessarily rejected that argument.

With respect to the second suggestion, appellant asserts that it was the district court's view that to demonstrate the

likelihood of entry "it must be shown that the officials in control of the company actually expressed an intention or reached a formal decision at a particular time to enter independently if the joint-venture route was not available" (Br. at 29).

Appellant's entire argument on this point is predicated upon the distinction made in the district court's opinion between the views of Olin's management employees charged with decision-making responsibility and the views of minor employees whose function it was to make preliminary studies and recommendations (Br. at 43-45). As the court below observed, appellant's case as to Olin "is built largely upon the optimism of R&D personnel and others of the Chemicals Division as to the chlorate potentialities" (FFR. 822). The court was therefore faced with the necessity of weighing that evidence against the evidence of the contrary views of top management, which was charged with responsibility for making the ultimate decision. After weighing the evidence, the Court found that it was insufficient to establish a probability of entry. In neither of its opinions did the district court hold that appellant's case failed because of the absence of proof of an affirmative inclination to enter.*

Appellant's third suggestion is that this Court should now adopt a new rule in effect excluding any consideration of internal corporate planning. Appellant concedes that this suggestion is based not on legal principles but on its views as to economics and administrative convenience, and the asserted unreliability of testimonial evidence (Br. at 35).

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*The district court's reference to the absence of evidence as to the views of Olin's board of directors is expressly qualified as an "even if" position, following the factual findings that the combined chlorate and chlorine-caustic plant proposed by Olin's Chemicals Division was never recommended to anyone at the corporate level and that if it had been recommended "it is not reasonably probable that it would have received the approval of the staff, the CAR and Mr. Osborne, all of whose approvals were essential" (FFR. 823).

Appellant's purported exclusionary test has no warrant in the law. It is, moreover, not a test at all, but only an *ad hoc* device for giving conclusive effect to inconsistently selected bits of evidence which help appellant and for precluding the trier of fact from considering the rest of a record whose facts compellingly disprove appellant's case. Under appellant's objective-subjective standard for limiting the fact-finding process, "subjective" evidence (when it hurts appellant's case) consists of "management's thoughts or words" as to the likelihood of independent entry (Br. at 34). Such evidence should be "accorded little weight". Appellant does not suggest any circumstances under which the trier of fact might exercise his function of weighing the evidence and resolving credibility and give such evidence any weight; rather, it is clear that what appellant really means is that such evidence may not be given any weight whatever. "Objective" evidence on the other hand is evidence of "capability and special incentive", and it is to be accorded "primacy" and "decisive weight" (Br. at 32-39).

But appellant's application of the supposed standard shows that it is not a standard at all. Appellant manipulates the labels "objective" and "subjective" to suit its purposes even though basic logic says that evidence which it calls "objective" is really "subjective" as it had earlier defined that category and evidence which it calls "subjective" is really "objective". One would suppose that appellant would make a reasoned and consistent application of its "objective-subjective" standard to the evidence in the case to demonstrate that the district court was wrong. But appellant's case cannot withstand such consistency. As appellant shifts from the definition and explanation of the new standard to its application to the evidence, the meaning of the standard changes.

We are told that "management views, at whatever level, should not be the focus of analysis" (Br. at 43). The clear implication is that it is the views of those below manage-

ment level that should be the focus of analysis. The standard no longer has to do with the nature of the evidence, but with the identity of the witness. The effect of this complete switch is to bar testimony of management personnel not only on the "subjective" matter of their intent, but also on the "objective" matter of their corporation's capability and incentive. Conversely, the views of those below management level become not only admissible but conclusive on the "subjective" matter of management's intentions.

Appellant's inconsistencies do not stop here, for it is clear from its comments on the evidence that appellant superimposes the further requirement that management's views are admissible and indeed conclusive evidence when they support appellant's case and the views of the lower level employees are worthless when they tend to destroy appellant's case.

Thus when research people in Olin's Chemicals Division—which, as the district court found (FFR. 809) is one of seven operating divisions competing with the other divisions for available capital funds at the corporate level—in their eagerness to show initiative and get some money for their division say that they find the sodium chlorate market attractive, this is supposed to compel the conclusion that Olin would have entered that market. On appellant's theory the trier of fact is not permitted to accept the contrary views of Olin's management who have to make the decision to which division and to which project to allocate funds.

On the other hand, when appellant's case needs to be bolstered by the showing that another chlor-alkali company was not a potential competitor, then the rule is reversed. For example, appellant admits with respect to Diamond Alkali (Br. at 22) that the 1959 market study "concludes with a recommendation that Diamond enter the sodium chlorate business". On this evidence—which appellant

would consider conclusive had it to do with probability of entry by Pennsalt or Olin—appellant continues that "[a]gain, there is no indication as to what resulted from this recommendation" and calls Diamond, a "remote prospect for entry" (Br. at 20-22).* Had Pennsalt or Olin entered into a joint venture with Diamond, appellant undoubtedly would be here urging that such joint venture was illegal and arguing that the Diamond market study recommending entry should be given "primacy" and "decisive weight" and the views of its management "little weight".

Furthermore, when a high level Pennsalt management meeting, including President Drake and Vice President Land (the head of the division charged with responsibility for the success of any chlorate project) expressed the opinion that a combination 30,000 ton chlorate-10,000 ton perchlorate plant looked "economically attractive" at a projected before-tax return of 31% (PX 143, 146, R. 506-10), this is supposed to end the matter as to Pennsalt since appellant would bar management evidence that later prospects for a Pennsalt perchlorate project were not attractive in light of the collapse of the perchlorate market.

Appellant contends that evidence that management decided against independent entry is entitled to less weight

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*In connection with the Diamond Alkali market studies (Br. at 22), appellant stated below in its comments on appellees' proposed findings:

> "The studies referred to were basically preliminary market studies and there is no evidence that Diamond progressed beyond the study stage or that the subject received management's consideration at that time" (CDFR 18.1).

And in responding to the proposed findings that Riegel (a large pulp and paper company) had certain proposals for captive sodium chlorate production under active negotiation, appellant stated:

> "Agree, except that defendants fail to note that the discussions on the part of Riegel have not been on the management level and no recommendation has yet been made to Riegel management concerning the Huron proposal . . . ." (CDFR 31.3).

than "objective" evidence relating to capability and incentive on the ground that "business decisions tend to be rational" (Br. at 30).

Of course business decisions tend to be rational. And such rational decisions seek the most profitable utilization of corporate resources. The relevant question is not whether "independent entry would have represented a profitable deployment of resources" (Br. at 31) but whether independent entry had sufficient prospects of profit not only to justify the correlative risks of loss but to make it a probable choice among the "various feasible and attractive alternatives" available for the investment of corporate funds (Br. at 39). The record shows, and the district court found, that independent entry did not meet the standard of Pennsalt's program for improving its shareholders' return on investment (FFR. 829, 835). The record similarly shows, and the district court found, that the studies made by Olin's Chemicals Division indicated insufficient profit for Olin (FFR. 820).

Appellant further argues that evidence of managerial intent is unreliable (Br. at 37). This merely seeks to revive the discredited rule that testimony of an interested party must be excluded and that rule's corollary that a party is excluded from testifying to his own intent. The availability of countervailing proof, cross-examination and permissive discovery to test such evidence makes regress to such a rule inappropriate in any class of cases. The problem of weighing evidence of corporate policy, plans and decisions, whether in the form of contemporaneous documents or trial testimony, does not differ from the problem of weighing comparable evidence of other facts. Although appellant deplores it (Br. at 38), it is a fact in antitrust cases as well as in other cases that "legality depends on a court's evaluation" of the evidence. *United States* v. *Oregon State Medical Soc'y*, 343 U. S. 326 (1952).

The reliability of such evidence affects only its weight and its weight is to be determined by the trier of fact. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949). As this Court stated in that case:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design." 338 U. S. at 341-42.

Appellant's arguments as to the weight of evidence do not present a substantial question for review by this Court. The district court's factual finding was correct; appellant failed to prove that, absent the joint venture, either Pennsalt or Olin would have entered the relevant market independently.

II

EVEN IF THE PROBABILITY OF INDEPENDENT ENTRY BY ONE WERE TO BE ASSUMED, THERE IS NO SHOWING THAT THE ELIMINATION OF THE OTHER AS A POTENTIAL COMPETITOR WOULD RESULT IN THE PROBABILITY OF A SUBSTANTIAL LESSENING OF COMPETITION.

The question whether, assuming the probability of independent entry either by Olin or by Pennsalt, the elimination of the potential competition of the other by the joint venture substantially lessened competition is not properly before this Court.* The trial court made no findings on

*It is at least doubtful that the question has been appropriately raised, since appellant's oblique reference to the subject in a footnote to its question presented does not seem fairly to comply with the letter or spirit of this Court's Rule 40(1)(d)(2). *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *cf. Irvine* v. *California*, 347 U. S. 128, 129-30 (1954) and *Communist Party* v. *SACB*, 367 U. S. 1 (1961).

that issue, since its finding against the probability of entry by either Olin or Pennsalt necessitated dismissal of the complaint.

Appellant acknowledges that ordinarily questions not reached below should be the subject of a remand but urges a different course here, because of the "the age of this protracted litigation" and because "the remaining issue presents few difficulties" (Br. at 54).* But the relevant evidence on the "remaining issue", to a great extent live testimony of many witnesses, is extensive and the resolution of the question requires findings of fact by the court below, which saw and heard the witnesses. *Cf. Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 628 (1944). Even on the bare record here, the evidence establishes that, given the facts in this market, on no hypothesis could the elimination by Penn-Olin of either Pennsalt or Olin as a potential competitor have lessened competition substantially.

In considering on this record whether Penn-Olin may have lessened potential competition, and whether that lessening is substantial, it is important to note, as this Court earlier recognized, that the joint venture did not eliminate one of the participants from the market but created "a new

*This case has taken six years principally because appellant has changed its theories on the issue in which it now sees few difficulties. At the first trial, appellant contended that, if both companies either would or could have entered the market, a joint venture between them was necessarily unlawful (R. 779-80 and n. 16). Appellant specifically declined to concede the necessity of any inquiry as to whether Penn-Olin represented a lessening of the competition that would have existed if only one of the parents had actually entered (R. 792 and n. 25). Appellant did not espouse that theory of showing a lessening of competition until its jurisdictional statement on its first appeal to this Court (at p. 18). Appellant also caused delay by taking a full year to decide whether to press an appeal from the district court's decision on remand.

competitive force therein" 378 U. S. at 170. Penn-Olin increased competition by making three competitors where formerly there had been but two.* The charge of "lessening of competition" is based on the claim that the increased competition would have been even greater if one of the Penn-Olin parents had entered the market independently and the other had remained a potential competitor.

At the first trial, appellant focused almost exclusively upon whether both Pennsalt and Olin, as a reasonable probability, would or could have built a sodium chlorate plant in the Southeast but for Penn-Olin. Accordingly, no attempt was made at that time to demonstrate that Pennsalt and Olin were in fact only two of the many companies which "had the inclination, resources and know-how to enter this market" 378 U. S. at 175.

On remand, however, the focus had shifted. It then became relevant to determine whether, had either Pennsalt or Olin entered, the other, even though it would not have entered, would have exerted any substantial influence on competition in the Southeast. In this manner, a finding could be made with respect to the probability that competition had been "lessened" by the joint venture in the sense that the increased competition produced by the joint venture was less than would have existed following independent entry by one of the venturers. Although appellant offered no evidence on the issue, appellees adduced testimony to enable analysis of the market in terms of what would have been the influence or impact of all companies (not just Pennsalt or Olin) which might have been regarded as likely entrants.

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*The response to this entry of another actual competitor was immediate. After Penn-Olin was announced, Hooker increased its capacity, employed a new salesman and a pulp and paper specialist, set up a pulp and paper research laboratory and offered its customers five-year firm price contracts. American Potash did likewise. (FFR. 784-85)

The evidence on remand established that in the Southeast a number of chemical companies were and still are potential merchant producers of chlorate and that the larger pulp and paper mills were and still are potential producers of chlorate for captive use. The market occupants recognize the potential competition of these groups and react to it. Therefore, the potential competition in the relevant market consisted, at the very least, of these two large groups of aggressive, well-financed companies. No single company in either group had or has any (much less substantial) independent significance in terms of impact or influence on the market.

Appellant is forced to concede that:

> "If . . . Pennsalt and Olin were but two among many potential entrants of equal significance in terms of capacity and incentive to enter, the elimination of the potential competition of one would not substantially change the competitive picture" (Br. at 56).*

To avoid the impact of its concession, appellant downgrades the significance of many of the chlor-alkali companies by ignoring testimony of the same character as that on which it relies to show the likelihood of entry by Pennsalt or Olin, and by stressing the very things which it

*In similar vein trial counsel for the government stated, at the opening of the trial on remand:

> "To the extent that when one company entered there may have been a lot of companies in the chemical industry, or in the paper industry, which were interested in sodium chlorate, if the remaining parent of Penn-Olin, whether it be Olin or Pennsalt, were simply sitting in a great big nest of potential entrants, all of whom had the capability and the resources and the know-how and the need to enter that Pennsalt or Olin did, or all of which were equally insignificant, then I think the Court might not be able to find that there was anything unusual about the characteristic of the potential competitor left in the wake of having no joint venture" (R. 136).

says should be disregarded when considering Pennsalt and Olin (Br. at 18-24).

In fact, the testimony of officials of various chemical companies, including Allied Chemical (R. 371-88), American Cyanamid (R. 398-407), Chipman (R. 151-73), Diamond Alkali (R. 208, 234-35, 365-71), Dow (R. 308-28), FMC (R. 338-46), Kaiser (R. 264-71), Stauffer (R. 236-43), Virginia Chemicals (R. 407-17), and Wyandotte (R. 195-208), established that those companies had the capability, resources, know-how and interest to enter the Southeast sodium chlorate market if a sufficiently attractive return on the investment could be anticipated. Each of those companies, except Kaiser, sold chemicals to the pulp and paper industry (R. 276-78, 152, 243, 315-28, 344, 366, 370, 374, 398-99, 408). Most of them considered the Southeast sodium chlorate market on one or more occasions prior to 1960 (DX 83-88; R. 196-208, 152-55, 236-39, 308-15, 372-74, 399, 401, 408-14). Each, with the exception of Virginia Chemicals, has considered entry since 1960 (DX 89-91; R. 204-06, 158, 240-42, 314-15, 338-40, 342-43, 368-71, 377-79, 406-07). All had adequate resources (DX 111).

Without exception, each company either had developed or could have obtained sound technology for merchant production of sodium chlorate (DX 38; R. 473, 380-81, 202, 205-06, 235, 310, 312, 340, 399, 404, 239, 154-55, 266-67, 410; *see also* R. 329-31). Allied Chemical (R. 386-88), Dow (R. 315-17, 320, 324-28), and American Cyanamid (R. 404-05) had negotiated with pulp and paper mills in the Southeast for the construction of "over the back fence" sodium chlorate facilities and Dow had constructed a plant to supply chlorine dioxide in solution by pipeline to Great Lakes in Canada. The testimony from all these chemical companies showed that they were potential competitors in the Southeast.

Appellant completely fails to mention the more important potential competition from the threat of captive production by the pulp and paper companies. To correct this omission we have summarized that evidence in our Statement.

Since 1960 at least ten large pulp and paper companies located in the Southeast have actively considered producing their own sodium chlorate. In 1959 Weyerhaeuser built a sodium chlorate plant at its mill in the West and since then four others have begun producing their own sodium chlorate outside the Southeast. By 1965 several were on the verge of doing so in the Southeast. With the large group of pulp and paper companies as well as all the potential merchant producers, Pennsalt and Olin were, indeed, "but two among many potential entrants".

More importantly, appellant fails to come to grips with the evidence concerning the fundamental question of the impact of this potential competition on the actual competitors in the marketplace. This requires consideration of the actual competitors' recognition of and reactions to the threat of potential competition. In analyzing the possible anticompetitive consequences of a merger between a company actually in a market and a potential competitor, a given potential competitor is significant only if it is "recognized by those in the market as the most likely entrant or one of a very few likely entrants, with barriers to entry by new companies or by other established firms being significantly higher."*

The same principle was explained in expert economic testimony at the trial on remand. What the actual competitors do in the market "depends on their state of mind, their perception of what is going on . . . . It does not depend

*Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1363 (1965). In this case there were no barriers to entry (PFR 7.72).

on the actual fact. . . . Suppose the paper companies were running a complete bluff, they had no intention of being dragged into the chemical business, the effect . . . would be the same" (R. 432).*

In apparent recognition of this principle, appellant asserts that:

> ". . . to Hooker or AmPot . . . faced with having to decide whether to forgo a price increase because it might evoke the entry of a new competitor, Pennsalt or Olin—whichever remained outside of the market—would be a firm whose probable reactions would have to be reckoned most carefully . . ." (Br. at 57).

But, again, this ignores *the record*.

At the trial on remand, the responsible officers of Hooker and American Potash detailed the potential competition, as they recognized it at the time Penn-Olin was formed. Each of them named at least seven chlor-alkali producers, other than Pennsalt or Olin, as companies which they regarded as "possible entrants" or "potential competitors" (R. 143-44, 175-177, 245-248).** And they both made it clear that,

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*From the testimony of appellees' economist Professor Paul W. Cook, Jr. of the Graduate School of Business Administration, Harvard University. Although appellant's economist was present when Professor Cook testified (Tr. 817) he never took the stand.

**Mr. Coey, Group Vice-President of Hooker, named Allied, Diamond, Dow, PPG, FMC, Monsanto, Stauffer, Wyandotte and American Cyanamid as possible entrants (R. 176). Mr. Dirksen, General Sales Manager of American Potash, did not mention Stauffer or Cyanamid but named all the others and added Jefferson Chemical (R. 246).

The difference in identity of the potential competitors named by the two officials stemmed, of course, from the fact that they viewed the chlor-alkali producers, as a group, as likely entrants and attached no significance to any particular member of the group. Coey referred to "most of the chlor-alkali industry" as possible entrants (R. 175) and Dirksen said "we generally regarded as potential competitors . . .

since they regarded the whole large group of companies as potential competitors, neither the pricing nor the marketing policies of Hooker and American Potash would have been affected by any one company's inclusion in or exclusion from the group (R. 177, 248-50). Indeed, although Allied Chemical was "foremost" of all the potential merchant competitors as American Potash saw it, Allied's inclusion or exclusion would not have made "any difference" to American Potash (R. 244, 249, 250). To both of them the threat of entry by their pulp and paper company customers was of greater concern than the possibility of entry by any of the group of chlor-alkali companies. Indeed, it was their desire to deter captive production by the pulp and paper companies, together with over-capacity, which triggered the 1964 price decrease (Tr. 232; R. 180, 257-258).

Faced with such clear and uncontradicted testimony, appellant has elected to ignore it. Nothing in the record warrants appellant's suggestion that if either Pennsalt or Olin remained in the ranks of possible entrants this would have had any influence on the pricing decisions of Hooker or American Potash. Quite to the contrary, the evidence shows that the only price change which was in fact influenced by potential competition was brought about by the threatened entry of the pulp and paper customers.

Although, prior to the joint venture, Pennsalt and Olin were part of a large group of potential competitors, neither was significant in the sense of having any special influence on the market. And, assuming Pennsalt or Olin had entered instead of Penn-Olin, nothing has occurred since then to give the other any such special significance.

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chlorine and alkali-producing companies, particularly those supplying the paper industry" (R. 246).

Similarly, Mr. Neubauer, Vice President and General Manager of PPG's Chemicals Division testified that in July of 1961, when PPG entered the Southeast market, it regarded the companies who were selling chlorine or caustic soda to the pulp and paper industry, the "group of the industry called the chlor-alkali group," as possible entrants (R. 143-44).

Appellant relies on *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964), *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967), (*"Clorox"*) and *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964), for the general proposition that the "elimination of important potential competition in a highly concentrated market" is illegal under Section 7 (Br. 55). But none of these cases aids appellant's argument on a record whose facts show that no important potential competition was eliminated.

El Paso and *Clorox* both involved the elimination through acquisition of a company which constituted substantially all the potential competition surrounding a relevant market. In the former, El Paso, a monopolist in the interstate supply of natural gas to California, acquired Pacific Northwest, the only other major interstate pipeline west of the Rockies. Northwest's determined efforts to get into the California market had driven a major contract price down 25%. Noting that Section 7 proscribes probabilities of substantial lessening of competition and does not deal with "ephemeral possibilities", 376 U. S. at 658, this Court found the requisite illegal effect:

> "Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions. We would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State". 376 U. S. at 659.

Similarly, in *Clorox*, the acquisition, in addition to creating a number of other anticompetitive consequences, elim-

inated the potential competition of Procter & Gamble, which had in fact exerted considerable influence on the market and which, the FTC had found, had been virtually the only prospect for new entry.

Continental Can is likewise inapposite. The defendants there were the second largest company in the metal container field and the third largest in the glass container field and were, by virtue of inter-industry competition between glass and metal, the second and sixth largest companies in the relevant market. As a result of the acquisition, the acquiring firm increased its percentage of the relevant market from 21.9% to 25%, approaching the percentage in *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321 (1963). This Court rejected defendants' argument that the two companies were not in competition with each other, holding that, by virtue of competition between glass and metal:

> ". . . Continental and Hazel-Atlas were set off directly against one another in this process and that the merger therefore carries with it the probability of foreclosing actual and potential competition between these two concerns. Hazel-Atlas has been removed as an independent factor in the glass industry and in the line of commerce which includes both metal cans and glass containers" 378 U. S. at 463.

In contrast to the substantial impact of potential competition in *El Paso, Clorox* and *Continental Can,* the evidence in this case affirmatively demonstrates that, absent Penn-Olin and assuming entry either by Pennsalt or Olin, the potential competition of the other would have had no impact on the market. Appellant's unfounded claim to the contrary deals in ephemeral possibilities of no quantitative importance.

Before Penn-Olin, Hooker and American Potash were supplying the demand of the Southeast sodium chlorate market. Each was able to expand its capacity. Entry of Penn-Olin and PPG doubled the number of sellers. In relation to the size of the market, the existence of four suppliers is a far cry from the competitive situations described as concentrated in the cases cited by appellant (Br. at 56).

The potential competition surrounding the market consisted not of a "small group" but of a large number of both chemical companies and pulp and paper companies. On this record, it could not properly be found that Penn-Olin's elimination of either Pennsalt or Olin as a potential competitor would have any likelihood of substantially lessening competition.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment below affirmed.

November 17, 1967.

Respectfully submitted,

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APPENDIX

DX 111

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, *Plaintiff* v. PENN-OLIN CHEMICAL COMPANY, OLIN MATHIESON CHEMICAL CORPORATION and PENNSALT CHEMICALS CORPORATION, *Defendants*	CIVIL ACTION No. 2282 STIPULATION

Without waiving any objection by any party as to relevancy, plaintiff and defendants hereby stipulate, solely for the purpose of this case and for no other, that:

1. The rated capacity of Penn-Olin's sodium chlorate production facility at Calvert City, Kentucky is between 25,000 and 26,500 tons per year. That estimated rated capacity has not changed since the plant commenced production in 1961. No expansion is underway or contemplated.

2. During the period of 1961 through 1964, Penn-Olin produced and sold the following quantities of sodium chlorate:

	Production	Sales
	(Short Tons)	
1961	3,475	8,731
1962	13,000	13,870
1963	19,166	19,635
1964	20,990	20,767

3. Sodium Chlorate ($NaClO_3$) Plant Production and Capacity for the Commercial Sodium Chlorate Producers in the Southeastern United States, Showing the Capacity and Production of all Plants in the Southeast and the Ratio of Production to Capacity.

(Short Tons)

	1962			1963			1964		
	Capacity	Production	Percent of Capacity	Capacity	Production	Percent of Capacity	Capacity	Production	Percent of Capacity
American Potash and Chemical Corp. (Aberdeen, Miss.)	23,500	[1]		23,500	[1]		24,500	[1]	
Hooker Chemical Corp. (Columbus, Miss.)	33,000	[1]		35,000	[1]		[3] 37,200	[1]	
Pittsburgh Plate Glass Co. (Lake Charles, La.)	[4]	[2]		10,000	8,500	85.0	15,000	10,000	66.6
Penn-Olin Chemical Co. (Calvert City, Ky.)	26,500	13,000	49.0	26,500	19,166	72.3	26,500	20,990	79.2
Total	83,000	66,293	79.9	95,000	77,771	81.8	[3] 103,200	88,967	86.2

[1] Not available.
[2] Production started in November 1962.
[3] Further capacity under construction. See in camera testimony of John Coey, April 28, 1965, p. 241.
[4] See in camera testimony of Christopher Bingham, November 16, 1961, pp. 522-23.

4. TOTAL ASSETS of Certain Chemical Companies—1960 Through 1964.

Company	1960	1961	1962	1963	1964
Allied Chemical Corp.	$ 800,854,209	$ 818,424,077	$1,022,377,751	$1,068,685,835	$1,141,168,961
American Cyanamid Co.	640,628,750	670,062,866	695,881,568	738,582,890	786,200,080
American Potash and Chemical Corp.	72,498,087	84,526,000	94,104,507	92,735,345	105,910,973
Chipman Chemical Co.	6,835,000	7,090,000	7,067,000	7,047,000	7,936,000
Diamond Alkali Co.	142,961,248	168,431,654	175,038,045	181,702,596	205,628,308
Dow Chemical Co.	901,244,193*	1,039,701,141*	1,055,336,873*	1,068,524,607	1,271,256,966
FMC Corp.	313,204,898	361,805,877	370,973,311	521,631,550	569,764,779
Hooker Chemical Corp.	187,340,755	190,554,373	209,155,470	216,924,572	257,025,431
Kaiser Aluminum & Chemical Corp.	785,607,521	811,656,910	817,923,976	846,770,774	916,864,863
Olin Mathieson Chemical Corp.	860,087,324	867,588,933	878,253,467	916,017,619	960,654,710
Pennsalt Chemicals Corp.	89,785,212	96,798,685	111,106,602	131,180,271	138,559,406
Pittsburgh Plate Glass Co.	624,829,704	620,338,218	637,736,000	767,882,000	783,492,000
Stauffer Chemical Co.	215,647,399	228,998,848	232,811,722	238,388,268	289,811,989
Virginia Chemicals, Inc.**	6,922,000	7,964,744	8,079,670	8,787,307	10,838,120
Wyandotte Chemicals Corp.	101,900,149	101,539,904	98,909,424	101,362,438	108,467,605

*Year ending May 31.
**Formerly known as Virginia Chemicals & Smelting Company, and Virginia Smelting Company.

5. TOTAL LAND, PLANT AND EQUIPMENT (Undepreciated) of Certain Chemical Companies—1960 Through 1964.

Company	1960	1961	1962	1963	1964
lied Chemical Corp.	$1,066,805,465	$1,165,084,800	$1,422,824,353	$1,500,896,5[illegible]	$1,627,116,967
merican Cyanamid Co.	651,908,187	689,589,343	716,529,874	728,636,110	760,701,242
merican Potash and Chemical Corp.	85,951,504	99,913,729	113,181,213	109,923,791	124,930,780
ipman Chemical Co.	2,630,000	2,694,000	2,650,000	2,617,000	2,701,000
amond Alkali Co.	184,539,547	210,304,734	218,680,059	230,936,669	234,829,823
ow Chemical Co.	1,140,431,620*	1,256,501,018*	1,239,299,793*	1,244,624,698	1,346,658,303
MC Corp.	224,669,739	238,209,451	262,043,320	340,585,067	385,920,844
ooker Chemical Co.	175,594,103	200,808,829	219,838,050	234,668,097	250,910,616
aiser Aluminum & Chemical Corp.	760,297,864	770,773,536	796,584,842	839,675,939	909,685,296
lin Mathieson Chemical Corp. ...	675,860,594	685,093,755	711,740,904	755,429,049	806,696,511
nnsalt Chemicals Corp.	103,814,340	103,236,498	117,273,916	133,203,192	130,347,299
ttsburgh Plate Glass Co.	635,723,159	661,359,598	688,759,000	860,348,000	855,738,000
auffer Chemical Co.	199,768,160	217,478,722	229,769,596	236,867,614	271,053,147
rginia Chemicals, Inc.**	2,936,000***	7,329,776	3,464,960***	7,878,554	11,244,570
yandotte Chemicals Corp.	148,938,132	156,487,526	160,071,402	161,459,547	173,824,176

*Year ending May 31.
**Formerly known as Virginia Chemicals & Smelting Company, and Virginia Smelting Company.
***After depreciation.

6. NET SALES of Certain Chemical Companies—1960 Through 1964.

Company	1960	1961	1962	1963	1964
ied Chemical Corp.	$ 765,795,683	$ 746,574,270	$ 869,131,124	$ 963,140,991	$1,043,132,945
erican Cyanamid Company	578,389,585	603,958,772	649,211,240	710,528,896	779,002,899
erican Potash and Chemical Corp.	50,546,003	45,957,596	46,847,012	51,812,777	53,842,283
ipman Chemical Co.	11,548,000	11,877,000	12,631,000	14,673,000	14,116,000
mond Alkali Co.	138,301,169	148,993,679	158,730,999	160,076,494	178,496,757
w Chemical Co.	781,433,740*	817,514,653*	890,638,726*	967,672,387	1,077,482,645
IC Corp.	353,065,715	403,251,467	493,585,459	617,959,453	830,146,284
oker Chemical Corp.	149,820,580	150,102,300	177,380,558	182,740,881	211,046,998
iser Aluminum & Chemical Corp.	406,573,706	424,045,015	444,165,007	437,072,071	515,905,954
n Mathieson Chemical Corp.	689,623,081	700,722,572	729,711,915	779,216,129	815,731,269
nnsalt Chemicals Corp.	90,919,270	95,633,297	105,177,894	136,178,650	144,442,688
tsburgh Plate Glass Co.	627,964,507	602,721,835	656,670,000	778,531,000	827,619,000
uffer Chemical Co.	219,725,874	225,770,280	236,643,567	251,066,065	278,999,707
rginia Chemicals, Inc.**	11,519,694	12,524,265	13,169,950	13,954,280	15,645,070
yandotte Chemicals Corp.	97,023,724	102,400,215	106,824,324	112,558,858	118,392,702

*Year ending May 31.
**Formerly known as Virginia Chemicals & Smelting Company and Virginia Smelting Company.

7. Net Income of Certain Chemical Companies—1960 Through 1964.

Company	1960	1961	1962	1963	1964
Allied Chemical Corp.	$ 51,286,191	$ 47,205,553	$ 57,978,128	$ 72,237,438	$ 81,010,174
American Cyanamid Co.	46,820,953	49,353,505	59,320,702	66,339,355	81,644,987
American Potash and Chemical Corp.	5,157,859	4,784,359	4,169,210	4,728,371	6,158,394
Chipman Chemical Co.	N.A.	N.A.	N.A.	N.A.	N.A.
Diamond Alkali Co.	11,740,223	10,673,485	10,973,483	10,666,119	13,191,279
Dow Chemical Co.	82,404,342*	64,439,878*	63,004,064*	80,694,715	93,835,967
FMC Corp.	21,096,320	23,452,363	26,099,469	32,625,085	44,484,870
Hooker Chemical Corp.	12,688,877	11,986,520	15,052,864	15,864,859	19,249,976
Kaiser Aluminum & Chemical Corp.	22,770,531	24,038,412	31,151,368	23,359,000	28,650,000
Olin Mathieson Chemical Corp.	38,219,000	32,125,257	34,081,635	36,997,986	41,339,962
Pennsalt Chemicals Corp.	4,943,543	5,505,940	6,365,196	8,070,781	9,219,124
Pittsburgh Plate Glass Co.	47,631,158	34,627,259	43,004,000	45,624,000	48,996,000
Stauffer Chemical Co.	19,814,934	17,367,121	19,230,596	19,922,614	23,910,556
Virginia Chemicals, Inc.**	631,352	671,863	646,920	804,270	922,660
Wyandotte Chemicals Corp.	4,880,933	4,779,161	5,072,134	4,845,205	7,373,081

*Year ending May 31.
**Formerly known as Virginia Chemicals & Smelting Company, and Virginia Smelting Company.
N.A.—Not Available.

8. Total Assets of Certain Pulp and Paper Companies—1960 through 1964

Company	1960	1961	1962	1963	1964
Brunswick Pulp & Paper Company*	$ 19,678,488	$ 56,741,716	$ 75,942,809	$ 78,041,595	$ N.A.
Buckeye Cellulose Corporation [Procter & Gamble]**	930,553,680	1,022,525,434	1,090,401,522	1,157,880,297	1,292,713,003
Champion Papers, Incorporated	201,771,263***	232,652,307***	253,844,773	261,495,695	297,265,899
Container Corporation of America	239,994,867	257,403,559	290,627,583	303,149,436	317,483,000
Continental Can Company	767,318,368	788,503,948	806,818,507	811,888,721	852,545,000
Crown Zellerbach Corporation	575,274,921	589,193,704	615,959,105	641,594,929	695,205,000
East Texas Pulp & Paper Company [Time, Inc.]**	230,585,000	242,331,000	261,624,000	293,212,000	311,073,000
Georgia-Pacific Corporation	295,081,872	316,136,158	476,996,000	565,150,000	642,970,000
Hammermill Paper Company	75,815,428	90,597,830	101,306,278	104,157,252	105,611,777
International Paper Company	930,030,265	978,930,362	1,009,398,253	1,038,769,190	1,080,357,936
Marathon Division [American Can Company]**	891,221,965	917,210,104	958,729,347	951,691,000	977,593,000
Mayonier, Incorporated	221,403,737	227,530,377	233,953,574	248,405,070	263,995,514
Riegel Paper Corporation	86,342,462	88,340,702	90,031,765	94,253,676	101,910,426
St. Regis Paper Company	562,582,560	568,006,883	584,731,035	603,674,854	598,364,923
Scott Paper Company	337,703,601	349,336,311	365,985,893	382,213,303	413,757,806
The Mead Corporation	251,410,480	288,083,607	315,231,807	337,763,335	353,114,272
Union Bag—Camp Paper Corporation	234,628,696	241,384,836	252,250,029	240,631,673	287,622,596
West Virginia Pulp & Paper Company****	270,373,000	271,684,000	275,012,000	278,017,000	275,467,000
Weyerhaeuser Company	578,244,996	580,330,985	618,281,290	646,564,652	708,145,181

*Owned fifty-fifty by Scott Paper Company and The Mead Corporation.
**Figures are for company whose name is shown in brackets.
***Year ending March 31.
****All figures for year ending October 31.
N.A.—Not Available.

9. Total Land, Plant and Equipment (Undepreciated) of Certain Pulp and Paper Companies—1960 through 1964.

Company	1960	1961	1962	1963	1964
Brunswick Pulp & Paper Company*	$ 14,784,983	$ 43,319,235	$ 49,124,994	$ 51,697,571	$ N.A.
Buckeye Cellulose Corporation [Procter & Gamble]**	567,670,021	601,316,367	645,307,354	698,313,725	745,332,245
Champion Papers, Incorporated	178,021,169***	202,585,638***	225,312,899	235,258,016	287,104,074
Container Corporation of America	245,836,222	262,142,072	283,287,901	313,643,704	339,946,000
Continental Can Company	754,488,407	790,083,964	824,010,970	863,927,218	N.A.
Crown Zellerbach Corporation	560,163,530	578,613,727	616,908,646	665,021,335	723,456,000
East Texas Pulp & Paper Company [Time, Inc.]**	110,389,000	120,417,000	135,628,000	152,936,000	163,953,000
Georgia-Pacific Corporation	128,839,927	146,556,267	240,834,000	314,740,000	382,250,000
Hammermill Paper Company	N.A.	N.A.	96,931,688	99,644,343	100,409,694
International Paper Company	976,640,377	1,025,293,549	1,071,736,413	1,140,786,240	1,260,341,066
Marathon Division [American Can Company]**	861,731,184	875,312,564	914,293,891	955,887,000	1,037,311,000
Rayonier, Incorporated	208,430,378	222,129,865	214,887,521	225,091,187	246,571,866
Riegel Paper Corporation	88,175,480	92,918,798	96,320,752	102,476,900	110,667,860
St. Regis Paper Company	531,423,629	554,801,799	572,000,449	585,670,073	611,871,383
Scott Paper Company	331,424,190	349,535,293	360,538,394	376,795,373	436,400,414
The Mead Corporation	243,725,940	266,365,875	283,677,613	296,922,406	320,979,612
Union Bag-Camp Paper Corporation	227,462,034	241,933,843	256,145,050	265,776,270	281,450,485
West Virginia Pulp & Paper Company****	321,467,000	338,862,000	356,334,000	372,139,000	389,886,000
Weyerhaeuser Company	562,000,616	622,459,104	677,778,617	705,729,021	778,773,988

*Owned fifty-fifty by Scott Paper Company and The Mead Corporation.
**Figures are for company whose name is shown in brackets.
***Year ending March 31.
****All figures for year ending October 31.
N.A.—Not Available.

10. Net Sales of Certain Pulp and Paper Companies —1960 through 1964.

Company	1960	1961	1962	1963	1964
Brunswick Pulp & Paper Company*	$ 18,777,521	$ 19,416,187	$ 21,964,732	$ 38,646,229	$ N.A.
Buckeye Cellulose Corporation [Procter & Gamble]**	1,441,548,293	1,541,904,779	1,619,383,226	1,654,462,637	1,913,721,771
Champion Papers, Incorporated	195,050,846***	306,777,526***	357,689,940	364,436,114	385,958,042
Container Corporation of America	327,262,662	330,098,491	343,044,945	352,207,628	390,575,000
Continental Can Company	1,116,956,000	1,153,331,000	1,182,906,000	1,154,024,000	1,198,120,000
Crown Zellerbach Corporation	553,710,660	562,604,219	589,101,779	614,735,324	662,242,000
East Texas Pulp & Paper Company [Time, Inc.]**	287,121,000	301,554,000	326,039,000	356,999,000	412,507,000
Georgia-Pacific Corporation	221,997,653	238,300,501	324,987,000	451,000,000	481,000,000
Hammermill Paper Company	80,035,946	88,595,022	120,160,835	121,090,917	127,802,057
International Paper Company	1,012,647,543	1,044,775,840	1,095,671,662	1,144,631,729	1,245,857,426
Marathon Division [American Can Company]**	1,058,994,165	1,093,299,197	1,180,532,671	1,149,364,000	1,225,839,000
Rayonier, Incorporated	129,066,264	134,704,045	141,972,075	142,303,246	154,686,473
Riegel Paper Corporation	97,916,713	102,370,501	111,655,180	116,367,770	128,419,850
St. Regis Paper Company	536,199,354	564,974,516	579,017,961	593,906,690	616,631,740
Scott Paper Company	313,276,344	333,148,190	354,449,607	370,039,920	385,382,315
The Mead Corporation	338,787,540	405,504,875	435,116,370	467,689,552	509,515,659
Union Bag—Camp Paper Corporation	212,958,691	228,431,568	232,575,771	238,848,047	257,923,327
West Virginia Pulp & Paper Company****	250,282,000	251,643,000	276,605,000	289,878,000	301,938,000
Weyerhaeuser Company	457,916,208	491,641,282	663,332,281	581,897,291	663,332,281

*Owned fifty-fifty by Scott Paper Company and The Mead Corporation.
**Figures are for company whose name is shown in brackets.
***Year ending March 31.
****All figures for year ending October 31.
N.A.—Not Available.

11. NET INCOME of Certain Pulp and Paper Companies —1960 through 1964.

Company	1960	1961	1962	1963	1964
Brunswick Pulp & Paper Company*	$ 771,000	$ 1,350,000	$ 1,624,250	$ 6,938,994	$ N.A.
Buckeye Cellulose Corporation [Procter & Gamble]**	98,078,076	106,632,804	109,356,179	115,765,284	130,811,238
Champion Papers, Incorporated	9,700,605***	5,502,644***	3,809,748	15,032,299	16,796,227
Container Corporation of America	17,076,427	18,298,491	18,670,122	18,829,790	23,140,000
Continental Can Company	27,803,000	36,137,000	40,968,000	40,112,000	48,869,000
Crown Zellerbach Corporation	40,076,477	36,678,857	38,786,393	39,319,641	46,593,000
East Texas Pulp & Paper Company [Time, Inc.]**	9,303,000	8,705,000	10,190,000	14,204,000	26,526,000
Georgia-Pacific Corporation	15,210,108	13,837,698	19,157,000	28,540,000	36,200,000
Hammermill Paper Company	3,310,430	2,463,496	5,978,596	4,386,779	5,623,612
International Paper Company	71,668,594	72,002,094	67,055,441	69,422,357	81,330,188
Marathon Division [American Can Company]**	35,382,413	45,012,767	48,736,046	44,139,000	46,896,000
Rayonier, Incorporated	9,504,303	7,990,038	11,422,267	12,636,873	18,553,178
Riegel Paper Corporation	3,067,661	3,301,699	4,524,947	3,914,758	6,029,797
St. Regis Paper Company	21,957,517	19,340,767	21,326,832	19,449,825	26,902,508
Scott Paper Company	27,729,943	31,141,353	32,696,304	36,256,059	40,157,420
The Mead Corporation	13,746,143	12,288,909	14,048,824	15,011,228	17,800,000
Union Bag—Camp Paper Corporation	18,590,325	16,972,622	18,832,898	17,143,190	19,645,908
West Virginia Pulp & Paper Company****	11,017,000	8,330,000	9,771,000	10,193,000	13,567,000
Weyerhaeuser Company	47,751,310	36,637,901	39,061,000	44,167,080	67,627,877

*Owned fifty-fifty by Scott Paper Company and The Mead Corporation.
**Figures are for company whose name is shown in brackets.
***Year ending March 31.
****All figures for year ending October 31.
N.A.—Not Available.

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May 5, 1965